

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

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|--------------------------------|---|----------------------------------|
| SHAY & KLAHR PROPERTIES, INC., |) | |
| d/b/a BRADFORD CREEK |) | |
| APARTMENTS, |) | |
| |) | |
| Plaintiffs, |) | |
| v. |) | Case No. 13-CV-00532-KEW |
| |) | |
| WESTERN HERITAGE INSURANCE |) | State Court Case No: CJ-2013-231 |
| COMPANY; CUNNINGHAM LINDSEY |) | |
| U.S., INC.; and SON COUNTRY |) | |
| INSURANCE, INC., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

**DEFENDANT WESTERN HERITAGE INSURANCE COMPANY'S
NOTICE OF REMOVAL**

COMES NOW, Defendant, Western Heritage Insurance Company ("Western Heritage"), by and through its attorneys of record, and pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 *et. seq.* and files its Notice of Removal of the above styled action from the District Court of Wagoner County, Oklahoma, and in support thereof would show the Court as follows:

INTRODUCTION

1. Plaintiff is Shay & Klahr Properties, Inc. d/b/a Bradford Creek Apartments ("Plaintiff"). Defendants are Western Heritage Insurance Company ("Western Heritage"), Cunningham Lindsey U.S., Inc., ("Cunningham Lindsey"), and Son Country Insurance, Inc. ("Son Country") (hereinafter collectively referred to as "Defendants").

2. On May 13, 2013, Plaintiff filed the above-entitled action against Defendant Western Heritage for breach of contract and bad faith. Western Heritage was served on November 7, 2013.

3. Western Heritage files this Notice of Removal within 30 days of learning that this case is removable to the United States District Court for the Eastern District of Oklahoma, and within one (1) year of the commencement of this action.

GROUND FOR REMOVAL

4. Removal is proper because there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.00, excluding interest and costs. 28 U.S.C. § 1332(a).

5. Plaintiff is currently, and was at the time of commencement of the state court action, a citizen of the State of Oklahoma. Plaintiff was incorporated in the State of Oklahoma, with its principal place of business in Tulsa County, Oklahoma.

6. Defendant Western Heritage is currently, and was at the time of commencement of the state court action, a citizen of the state of Arizona.

7. Defendant Cunningham Lindsey is currently, and was at the time of commencement of the state court action, a citizen of the state of Texas.

8. Defendant Son Country, a citizen of the state of Oklahoma, should not be considered in determining diversity jurisdiction because it is an improperly joined/fraudulently joined defendant (i.e. sham defendant) against whom the Plaintiff has no possibility of recovery. Pursuant to applicable case law if plaintiff has no possibility of recovery against the non-diverse defendant, or plaintiff's jurisdictional allegations are fraudulent and made in bad faith, joinder of the resident defendant is deemed fraudulent. *Slover v. Equitable Variable Life Ins. Co.*, 443 F.Supp.2d 1272 (N.D. Okla. 2006); *Dollison v. American Nat'l Ins. Co.*, 2013 WL 1944891 (N.D. Okla.); *Smoot v. Chicago, Rock Island & Pac. R. Co.*, 378 F.2d 879 (10th Cir. 1967); *Dodd v. Fawcett Publ., Inc.*, 329 F.2d 82, 85 (10th Cir. 1964); *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999); *Dodson v. Spiliada Mar. Corp.*, 951 F.2d 40, 42-43 (5th Cir. 1992).

9. Plaintiff has asserted a bad faith breach of contract claim against Western Heritage for allegedly failing to pay a covered claim under Plaintiff's insurance policy with Western Heritage. Son Country is an insurance broker that procured the subject policy for Plaintiff. Plaintiff's claim against Son Country is based on some alleged failure of Son Country in placing Plaintiff's insurance policy with Western Union. (See Plaintiff's Petition attached hereto as Exhibit "B" ¶ 27.) Plaintiff also claims that Son Country failed to aid Plaintiff in obtaining policy benefits for Plaintiff. (See Exhibit "B" ¶ 28.)

10. Generally, under Oklahoma claims against insurance brokers/agents are limited to claims based on a failure to procure a requested insurance policy. *See Swickey v. Silvey Companies*, 979 P.2d 266 (Okla. Civ. App. 1999). Plaintiff flatly admits that the subject claim at issue was covered under the insurance policy with Western Heritage-. (See Exhibit "B" ¶s 10-13.) Therefore, Son Country cannot be liable for failure to procure proper insurance. Further, Son Country would not have an obligation to aid Plaintiff in obtaining policy benefits. Accordingly, on the face of the Petition, Plaintiff has no possibility of recovery against the non-diverse defendant as Son County properly obtained insurance for Plaintiff. Removal to the United States District Court for the Eastern District of Oklahoma is proper.

11. By Plaintiff's own admission in its Petition, Plaintiff is alleging to have "suffered damages in excess of the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code." (See Exhibit "B" ¶s 22, 30, and 43.) Thus, the amount in controversy in this action exceeds \$75,000.00, excluding interest and costs.

VENUE

12. Venue is proper in this district pursuant to 28 U.S.C. § 1441(a) because the state court where the action has been pending is located in this district.

NOTICE

13. Pursuant to 28 U.S.C. §1446(d), Western Heritage will file a written notice of removal and a copy of this Notice of Removal and all attachments with the clerk of the state court action where this action has been pending and will serve a copy of such documents upon Plaintiff's counsel. In filing this Notice of Removal, Western Heritage does not waive and expressly reserves all objections and defenses which it may have under Rule 12(b) of the Federal Rules of Civil Procedure and any other rules applicable to this action.

STATE COURT PROCEEDING REMOVED

14. This case is being removed from the District Court of Wagoner County, Case No. CJ-2013-231, State of Oklahoma, 307 East Cherokee Street, Wagoner, Oklahoma 74467.

STATE COURT PLEADINGS

15. Copies of all process, pleadings, and orders in the state court action are attached to this Notice of Removal as required by 28 U.S.C. §1446(a).

EXHIBITS TO NOTICE OF REMOVAL

16. Pursuant to rule 81.2 of the Local Civil Rules for the United States District Court for the Eastern District of Oklahoma, which requires Defendant Western Heritage to file a clearly legible copy of all documents filed or served in the case, along with a copy of the docket sheet in the case, the following documents are attached to this Notice of Removal as correspondingly lettered exhibits:

- A. Wagoner County Docket Sheet for case No. CJ-2013-231;
- B. Petition filed stamped May 13, 2013;
- C. Original Summons (Son Country);
- D. Original Summons (Western Heritage);

E. Original Summons (Cunningham Lindsey);

F. Motion to Transfer Venue and Brief in Support, filed stamped June 19, 2013;

G. Unopposed Application For Extension of Time to Respond to Motion to Transfer Venue, file stamped July 3, 2013;

H. Order Granting Unopposed Application for Extension of Time, file stamped July 11, 2013;

I. Plaintiff's Response to Defendant Son Country Insurance Agency, Inc.'s Motion to Transfer, or in the Alternative Motion to Amend Plaintiff's Petition, file stamped July 15, 2013;

J. Order Overruling Motion to Transfer Venue, file stamped July 23, 2013;

K. Answer of Son Country Insurance, Inc., file stamped September 20, 2013;

L. Return of Service, file stamped November 12, 2013;

M. Entry of Appearance and Reservation of Time (Western Heritage), filed November 27, 2013.

CONSENT TO REMOVAL

15. Defendant Cunningham Lindsey consents to removal of this action. No consent is required from Defendant Son Country as Son Country is not a proper defendant. *Esparza Rico v. Flores*, 405 F. Supp.2d 746 (S.D. Tex. 2005); *Coughlin v. Nationwide Mut. Ins. Co.*, 776 F.Supp 626 (D. Mass. 1991).

JURY DEMAND

16. Plaintiff did not demand a jury in the state court action.

WHEREFORE, PREMISES CONSIDERED, Defendant, Western Heritage Insurance Company, Inc., prays that the above cause of action now pending in the District Court of Wagoner County, Wagoner, Oklahoma be removed to the United States District Court for the

Eastern District of Oklahoma, and that Western Heritage be granted such other and further relief, both general and special, at law or in equity, to which it may show itself to be justly entitled.

Respectfully Submitted,

JONES, GOTCHER & BOGAN, P.C.

By: /s Adam J. Strange

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**ATTORNEYS FOR WESTERN HERITAGE
INSURANCE COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I caused to be mailed in the United States Mail with proper postage fully prepaid thereon, a true and correct copy of the above and foregoing upon the following:

Brian E. Dittrich, Esq.
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And

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s/Adam J. Strange
Adam J. Strange